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# Criminalising Neonaticide: Reflections on Law and Practice in England and Wales

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# **Criminalising Neonaticide: Reflections on Law and Practice in England and Wales**

Karen Brenan and Emma Milne

Ruth Percival, a 28 year-old woman, gave birth to her son on the toilet in her home in November 2014. The child was born with the umbilical cord wrapped around his neck and was reported by Ruth's father to have 'appeared "sallow and lifeless" and he thought was "obviously deceased"' (The Telegraph, 2017). Ruth and her father were initially arrested on suspicion of murder and conspiracy to conceal the birth of a child. Over two-years later, both charges were dropped, and Ruth and her father were arrested on suspicion of child neglect; later this charge would also be dropped. Despite a prolonged investigation and several post-mortems, the cause of death of the baby boy remained 'unascertained'. A coroner's inquest, conducted almost two-years after the death of the child, was halted when the coroner decided to adjourn the inquest and refer the case to the Director of Public Prosecutions; consequently, Ruth and her father faced a third criminal investigation over the death of the baby. The referral came after three medical professionals presented evidence at the inquest that the baby had been born alive, suggesting that he could have survived if the correct medical attention had been given. Dr Ruth Gottstein, a consultant neonatologist, told the court 'If resuscitation had been initiated, I think the baby would survived' (Parveen, 2016). Further suspicion was aroused following evidence that Ruth had placed the baby in the outside bin (Ruth and her father denied this); that paramedics had not been called immediately following the birth; and that the child's body was left alone in the house while Ruth and her father attended a previously arranged doctor's appointment after cleaning the blood from the bathroom floor. The investigations into the birth and death of Ruth's child ended after 28 months, when the Crown Prosecution Service (CPS) decided that there was 'insufficient evidence to provide a realistic prospect of conviction for a criminal prosecution' (The Telegraph, 2017).

This case illustrates some of the typical features of the phenomenon of ‘neonaticide’, newborn child killing: a single woman experiencing an unwanted pregnancy and giving birth alone, resulting in the death of her baby. Such cases are unusual in Western modern society and are emotionally distressing for the public and professionals. The Percival case also highlights a number of issues with regard to criminalising women whose babies die at birth. First, it highlights the efforts of the police and CPS to investigate this particular case with the aim of initiating prosecution, despite the limited evidence available to them. Second, it demonstrates that there are limits to the reach of the criminal law in cases involving the deaths of neonates following ‘secret’ births. Finally, the case raises questions about the purpose and appropriateness of criminalisation in cases of maternal neonaticide.

The purpose of this chapter is to examine these issues and to this end we do the following: first, we provide an outline of the literature on the circumstances and incidence of neonaticide; second, we discuss some of the problems that arise in connection with convicting women of criminal offences, particularly homicide crimes, when their babies die following a ‘secret birth’; third, we briefly outline what we know about criminal justice practice in these cases, and, finally, we offer some reflections for future research and practice.

## **What is neonaticide?**

The term ‘neonaticide’ was first used by Resnick (1969, 1970) to describe the killing of an infant within the first twenty-four hours of life. Resnick, and others, argue that it is a distinct form of child homicide. It is usually committed by the mother in the context of an unwanted pregnancy (d'Orbán, 1979; Friedman and Friedman, 2010; Meyer and Oberman, 2001; Porter and Gavin, 2010). The term neonaticide is widely used within medical, legal, psychiatric, psychological and criminological literature and many attempts have been made to understand its causes and consider prevention.

It is difficult to determine the rate of neonaticide. Scholars have commented on the inaccuracy of official statistics; Wilczynski (1997) argues there is a large ‘dark figure’ of child killing (victim aged under 16 years), estimating that true incidents of child homicide are 3 to 7 times higher than official statistics report. In the UK, no official record of how many children are killed within the first day of life are kept. The Home Office record the number of homicides that occur each year in the Homicide Index. However, as we discuss below, proving a homicide has occurred can be very difficult in cases of neonaticide. In some cases, the death of a foetus/newborn child may be recorded under the criminal offence of concealment of birth (COB). Section 60 of the Offences Against the Person Act 1861 (OAPA), makes it is an offence to conceal the dead body of a baby in order to conceal the fact the infant had been born; it is irrelevant for the purposes of conviction how and when death was caused. Therefore, cases of suspected COB may also be cases of neonaticide. Due to the close connection between COB and newborn homicide (Milne, Forthcoming), it is possible that some deaths will be recorded in both the Homicide Index and the police recorded statistics for concealment, producing a duplicate count. Despite the shortcomings, the data presented in Table 1 offers the most comprehensive picture of known neonaticide cases and taken together, the average is 7 deaths per year. Drawing upon Wilczynski’s (1997) conclusion that actual figures are, at least, three times higher than official statistics, then the possible number of neonaticides to occur each year is 21.<sup>1</sup>

Year	Offences currently recorded as homicide, victims one day old or less <sup>2</sup>	Police recorded crime: Concealing an infant death close to birth <sup>3</sup>	Total
2002/03	3	7	10
2003/04	2	6	8
2004/05	0	6	6
2005/06	0	8	8
2006/07	3	4	7
2007/08	1	8	9
2008/09	5	8	13
2009/10	0	6	6
2010/11	1	9	10

2011/12	1	5	6
2012/13	1	2	3
2013/14	2	2	4
2014/15	1	5	5
2015/16	2	5	5
Annual mean	2	6	7

*Table 1 Estimated number occurrence of neonaticide 2002/03 to 2015/16*

Neonaticide is almost exclusively committed by women. Much of the literature constructs a stereotype of the neonaticidal woman: she is young, often a teenager, single, lives with her parents, comes from a low socioeconomic background, and has few economic, social or emotional resources to deal with a pregnancy (See Alder and Baker, 1997; Craig, 2004; d'Orbán, 1979; Resnick, 1969; Porter and Gavin, 2010). Such women have also been described as 'passive', not taking active steps to address their pregnancy (Spinelli, 2003; Beyer et al., 2008; Amon et al., 2012). However, not all women fit the stereotype. For example, perpetrators older than teenagers have been identified in numerous studies. A review of coroner's reports and death certificates in Finland and Austria conducted by Amon et al. (2012) concluded that perpetrators' average age was 28. There is also dispute in the literature about perpetrators' socioeconomic background. For example, Beyer et al. (2008), in their review of law enforcement case files in the US, concluded that the majority of the offenders were middle-class, with only 5 out of 37 women identified as working-class. Similarly, a review of cases in the US using newspaper reports, conducted by Meyer and Oberman (2001), found suspected women came from diverse socioeconomic backgrounds and across ethnic groups. Many studies reported that perpetrators are not always single, childless or living with their parents. Amon et al. (2012) noted that 16 of 28 perpetrators were married or living with a partner and all sixteen reported having sexual relationships during the pregnancy. Beyer et al. (2008) found that 15 of 40 perpetrators had experienced previous pregnancies.

One similarity between cases of neonaticide is that women keep their pregnancy secret from the wider world and specifically from the individuals around them whose response to their pregnancy they fear, such as parents, other relatives and partners. In this regard, neonaticide often follows a concealed or denied pregnancy, a fact which creates difficulties for detection and any subsequent prosecution. Debate exists within the literature as to the extent to which a woman can be unaware that she is pregnant. For example, several scholars argue that women must have some awareness of her pregnancy, but then deny knowledge of its existence to herself and others (Spinelli, 2003; Brezinka et al., 1994; Miller, 2003). Others have argued that there is a distinction between a woman who knows she is pregnant and thus conceals her pregnancy from others, and those who have only an unconscious awareness of their pregnancy and so are in denial about its existence (Wessel et al., 2002; Vellut et al., 2012). Other scholars have also documented the co-occurrence of denial and concealment, arguing women can experience both at different times during their pregnancy (Amon et al., 2012; Meyer and Oberman, 2001; Brezinka et al., 1994). From the literature, it is difficult to conclude the extent to which a woman may be aware of her pregnancy prior to the onset of labour and subsequent delivery.

The connection between concealed/denied birth and neonaticide has led a number of scholars to conclude that concealed or denied pregnancy is a risk factor for neonaticide (Beier et al., 2006; Beyer et al., 2008; Craig, 2004; Friedman and Friedman, 2010; Porter and Gavin, 2010). However, as Spinelli (2010) argues, neonaticide is not the usual outcome for a concealed/denied pregnancy. Data pertaining to the number of concealed/denied pregnancies each year would support this conclusion. While we have no accurate figures of the number of concealed/denied pregnancies each year, researchers have estimated that they occur from one in every 2,455 births (study from Germany, Wessel et al., 2002) to 1 in 1,000 (study in France, Pierronne et al., 2002; cited in Gonçalves et al., 2014). Using a study from Wales that

concludes concealed pregnancies occur one in 2,500 deliveries (Nirmal et al., 2006), we can estimate that approximately 280 concealed/denied pregnancies occurred in England and Wales in 2015, based on 700,999 babies being delivered, live- and stillborn (Office for National Statistics, 2016). As outlined earlier in the chapter, we do not know the exact instances of neonaticide that occur, although approximately seven cases are recorded each year. Regardless of our lack of certainty in these figures, it is very unlikely that the rate of neonaticide is close to 280. Consequently, it is reasonable to conclude that while neonaticide often occurs after a concealed/denied pregnancy, a concealed/denied pregnancy is not always a predictor of risk.

### **Criminalising ‘neonaticide’**

Whilst the literature may term deaths of babies in the period immediately surrounding birth as ‘neonaticides’, the criminal law’s approach is somewhat different. To start with, there is no specific crime of ‘neonaticide’. A range of offences which include standard homicide offences (murder and manslaughter) and specific statutory crimes tailored to the fact that death occurred in the context of pregnancy and childbirth (such as infanticide, child destruction, COB), may be used to criminalise women whose infants die around birth. Second, the fact that a baby died at or around the time of birth, even if this was ostensibly due to (morally) blameworthy conduct on the part of the mother, such as an act of violence or neglect to ensure for safe delivery of the baby, does not necessarily mean that she is guilty of any crime. Whether a crime has been committed will depend on whether the legal requirements for a specific offence have been met on the evidence available. The criminalisation of women for the deaths of their babies at birth gives rise to myriad complexities. Many of the difficulties stem from the law’s distinction between the foetus and a legal person, and the different levels of protection offered to each. Some of the issues that

arise in connection with criminalising women for the deaths of their babies at birth will now be briefly explored.

### ***The Born Alive Rule***

In everyday language the terms ‘child’, ‘baby’, ‘infant’ may be aptly used to capture the identity and status of those who die around the time of birth. Legally, however, the situation is complicated by the demarcation between the foetus and legal persons that is created by the born alive rule. Where neonaticide is suspected the law on homicide requires proof that the victim had achieved legal personhood, that they were a ‘reasonable being in rerum natura’ (Coke, 1681, pp. 50-1). This means that a conviction for murder, manslaughter, or infanticide is only possible if, at the time death occurred, the victim was ‘born alive’.

To be born alive, the body of the infant must be fully expelled from the birth canal, so that no part of the infant remains inside the mother, and there must be an independent existence (Davies, 1937, pp. 206-208; Ormerod and Laird, 2015, p. 559). Historically, there was a lack of clarity as to what constituted an independent existence, there being ‘no authorised definition of live birth in the theory of law’ (Atkinson, 1904, p. 134). Questions relating to whether and when the child had breathed, whether the child had an independent circulation, and whether the umbilical cord had been cut, were considered important (Atkinson, 1904). The current accepted test, stemming from nineteenth-century case law, for an independent existence, is evidence of an independent circulation (*R. v. Enoch and Pulley*). The umbilical cord does not need to be severed (*R. v. Crutchley*; *R. v. Reeves*; *R. v. Trilloe*). Breathing is a factor to consider, but it is not decisive (*R. v. Poulton*; *R. v. Brain*; *R. v. Sellis*). Whilst the test is now clear, proving that an independent circulation was established may still give rise to difficulties (Ormerod and Laird, 2015, p. 559).

Where death occurs before a neonate has achieved legal personhood no homicide offence has been committed. In such cases, depending on the factual circumstances involved,



the prosecution may be able to rely on some other offence which does not require the victim to have achieved legal personhood, such as COB, procuring a miscarriage (OAPA, 1861 s58), or child destruction (Infant Life (Preservation) Act 1929, s.1). However, although each of these offences allows for conviction for an offence in the absence of a live birth, they have their own unique requirements which may on the evidence preclude successful prosecution.

The relationship between the born alive rule and the other requirements for establishing liability for any of the existing homicide offences might mean that even if a neonate dies after it has achieved legal personhood, there may be other reasons, connected with the legal distinction between foetuses and legal persons, which preclude a homicide conviction. For example, whilst acts done pre-birth which result in the death of the neonate after a 'live birth' will satisfy the *actus reus* (conduct) requirement for murder, problems may arise in establishing the *mens rea* (mental fault) for that offence in such circumstances due to the legal distinction between the foetus and a 'human being' (Temkin, 1986; Simester et al., 2016, pp. 375-376; *Attorney General's Reference (No. 3 of 1994)*). This can give rise to complex issues that are beyond the scope of this chapter.

### ***Criminalising Neglect***

Cases of 'neonaticide' discussed in the literature show that the deaths of infants at the time of birth are not always due to a positive and deliberate act of violence (Beier et al., 2006).

Neonates may die for a variety of reasons, including failure to ensure safe delivery by seeking medical assistance; failure during an unassisted birth to perform certain tasks to ensure the survival of the newborn, such as cutting and tying the umbilical cord; mishandling of the neonate during or after birth (for example, accidental strangulation or suffocation when trying to expel the baby from the birth canal); leaving the child to die after birth. There are two issues that arise in cases where death was not due to a deliberate act of violence but to conduct which may be termed 'neglect'. The first issue relates to restrictions on imposing

criminal liability for an ‘omission’ rather than a positive ‘act’. The second is connected with the level of criminal, as opposed to moral, fault involved, and whether the woman can be held liable for a homicide offence where death was due to maternal neglect.

First, many of the above examples of neglect involve ‘omissions’ rather than ‘acts’. Overall, the criminal law is slow to criminalise individuals for their omissions. There are some limited circumstances where the law imposes a ‘duty to act’ and where failure to act may result in criminal liability being imposed for a crime such as homicide. One of the well-recognised duties is that which a parent owes to their child (Simester et al., 2016, pp. 75-76). The issue of whether a woman has a duty to act with regard to her unborn child, however, is complicated by the born alive rule. Whilst there are no recent authorities explicitly on this point, it would seem that the parental duty to act only arises after the child has been born alive. The older case law establishes that a decision to give birth alone, and therefore fail to prepare for birth, is not sufficient to allow for a homicide conviction; neglect before birth does not suffice and there must be evidence of neglect after the child is born (*R. v. Knights*; *R. v. Izod*).

In terms of more recent authorities, we must look to the civil law. In the civil, rather than criminal, law a woman does not owe her foetus a ‘duty of care’ and therefore cannot be sued by her child for harm she causes to it through her negligent behaviour whilst the child was a foetus. The only exception involves injury caused as a result of a road traffic accident. However, in such instances a child would claim compensation through its mother’s motor insurance.<sup>4</sup> Women do not lose any rights to determine what they do to their own bodies, despite being pregnant. In the medical law context, women who have mental capacity can refuse treatment (for example, a caesarean section), even where this carries a risk of death for the foetus/child (*St George’s Healthcare NHS Trust v S*; Cave, 2004, pp. 62-74). The Court of Appeal recently indicated – in a case to do with whether women who cause serious harm

to their foetus (and child) by drinking excessively during pregnancy can be liable for a criminal offence under our existing law, that the approach to the issue of maternal duty of care towards the foetus in the above civil contexts would similarly apply in the criminal law (*Criminal Injuries Compensation Authority v First-tier Tribunal*).

Whilst the concept of a 'duty of care' in criminal law is not the same as a 'duty to act' (Ormerod and Laird, 2015, pp. 638-641), the indication from the above is that women have no duty to act to protect their foetus from harm or death and so cannot be liable for homicide where death was caused by a pre-'live birth' omission. In other words, it seems that a woman has no duty to act with regard to her foetus. Consequently, she cannot be liable for homicide for an omission made prior to or during birth which led to the death of the baby, even if death occurred after a live birth. The issue of criminalising women for the deaths of their newborn infants as a consequence of their failure to act appropriately with regard to ensuring the survival and health of the foetus/unborn child highlights moral and legal questions which point to a tension between maternal autonomy and maternal responsibility. As the law stands, it seems that autonomy is given greater primacy, even where this poses a risk to the health or life of the foetus/ child born alive.

Second, the question of liability for homicide in the event of the baby dying as a result of neglect after birth is complicated by the requirements for mental fault. To be liable for murder it is necessary to show an intention to kill or an intention to cause really serious harm (*R. v Moloney*). Cases involving 'neglect' would not meet this threshold, though it should be highlighted that a murder conviction can be sustained on the basis of an omission, for example a failure to care for the baby (providing this occurred after a live birth), if this was done for the purpose of causing death or seriously harming the baby. In the absence of violence, however, it will surely be difficult to prove such intent, particularly given the woman's likely physical and mental condition following an unassisted labour. The more

appropriate offence to charge in cases involving neglect of the baby after birth, where there is no evidence of an intention to kill or seriously harm, is gross negligence manslaughter.<sup>5</sup>

However, there may also be problems in securing a conviction for that offence because the test for ‘gross negligence’ requires the jury to consider whether the accused ‘*deserves*’ to be convicted (*R v Adomako*, p. 187). This allows for moral rather than legal judgments about the seriousness of her conduct in the circumstances involved. As a result, the law lacks certainty – what one jury may consider criminal, another may not (Simester et al., 2016, pp. 419-420). Certainly, it is feasible that in a case involving the typical neonaticide facts outlined above, a jury would conclude that the mother does not deserve conviction for manslaughter.

### ***Impact of mental state on mental fault requirements***

The literature on neonaticide highlights that women and girls whose neonates die in the context of an unassisted birth may experience particular effects on their mental state. For example, in some cases, they may lose consciousness as a result of the physical trauma of an unassisted birth; in others, they may claim that they didn’t know what they were doing at the time, or that they experienced a sense of dissociation. In particular, research has shown that women who kill neonates can experience active fear and cognitive denial of pregnancy.

Meyer and Oberman (2001) argue that this leads women to delay any decision about the pregnancy until it is too late; consequently, the birth of the child comes as a shock to the woman who kills from fear and panic in this situation. Furthermore, it is known for women not to remember the birth and some women with a more profound denial will not recall the pregnancy. Spinelli (2003) draws similar conclusions after conducting psychiatric interviews with seventeen American women who were accused of killing their newborn children.

Spinelli categorised the women as having unassisted births associated with dissociative psychosis in 10 cases, dissociative hallucinations in 14, and intermittent amnesia delivery in 14 cases. Each woman described ‘watching’ herself during the birth. Twelve experienced

dissociative hallucinations ranging from an internal commentary to critical and argumentative voices; 14 experienced brief amnesia; nine described associated psychotic symptoms at the sight of the infant. When the women awoke from the dissociative hallucination, it was to find a dead newborn child whose presence they could not explain.

The fact that the accused was unconscious, in a dissociative state, or had some other mental disorder, may affect her criminal liability in a number of ways. It may, for example, give rise to a defence, such as automatism, insanity (*M'Naghten's Case* (1843) 10 C and F 200; 8 ER 718), or, on a murder charge only, the partial defence of diminished responsibility (Homicide Act 1957).<sup>6</sup> In particular, the offence/defence of infanticide may be used.

Infanticide operates as an alternative to murder or manslaughter in cases where a woman, by a 'wilful act or omission' kills her baby (aged under 12 months) whilst the 'balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent the birth of the child' (Infanticide Act 1938, ss. 1 and 2). Although the statute extends to victims aged under 12 months, when it was originally enacted in 1922 it was primarily focused on facilitating lenient treatment of women who killed their babies at birth due a reluctance to convict her of murder and condemn her to death (Davies, 1937, 1938; Brennan, 2013a).

Although infanticide allows for a more lenient approach, feminists have criticised this law on the ground that it medicalises the offender, explaining her crime as the product of a biologically produced mental disturbance and failing to acknowledge any social, economic, and political causes (Morris and Wilczynski, 1993). However, research into the history of this law shows that the mental disturbance rationale was based on a lay understanding of infanticide which could take account of the social and other causes of infanticide (Ward, 1999; Kramar, 2005; Kramar and Watson, 2006; Brennan, 2013b). In terms of how the law has been applied in practice, research has shown that it allows for 'covert recognition' of

social causes (Morris and Wilczynski, 1993), and that it operates as a ‘legal device’ to facilitate lenient treatment of at least some girls and women who kill their babies at birth (Mackay, 1993, p. 29). Other jurisdictions that have adopted the same law have had a similar experience (Brennan, forthcoming-b)

In summary, ‘infanticide’ may be a particularly apt charge or conviction option in cases of ‘neonaticide’, and to some extent is tailor-made for these cases. Although the requirements for murder or manslaughter must also be proven, it would seem that the specific medical rationale of the infanticide law is not difficult to meet, and so those who kill their babies at birth may be convicted of infanticide even where there is little evidence of a specific mental disorder. An infanticide conviction generally results in exceptionally lenient sentences (in the context of homicide); offenders are rarely imprisoned (Walker, 1968). However, there may be wider social implications of a prosecution, such as being prevented from raising any subsequent children, even if the neonaticide occurred when the woman was a teenager and her future pregnancy occurred many years later in very different circumstances.

### **Criminal Justice Practice in Cases of Neonaticide**

There is very little research available on how cases of ‘neonaticide’ are currently dealt with by the criminal authorities in England and Wales. The Ruth Percival case mentioned in the introduction indicates that the CPS seriously consider initiating prosecutions in these cases, and is willing to explore a range of criminal offence options in this regard. However, before prosecuting for a specific offence, there must be ‘sufficient evidence [of the requirements for that offence] to provide a realistic prospect of conviction’ (CPS, 2013, para. 4.4). As the Percival case highlights, there may be difficulties in cases of suspected neonaticide in meeting the requirement for evidential sufficiency. This is supported by the above analysis of some of the complexities involved in seeking to establish the requirements for criminal

offences, particularly for homicide, in typical cases of suspected neonaticide. These cases pose unique challenges which may preclude criminalisation of a woman whose baby dies following a secret birth due to there being insufficient evidence to support a criminal charge. Further, even where there is sufficient evidence to charge with an offence, the CPS is not obliged to prosecute because the second part of the test for prosecution must be met, namely that prosecution is in the 'public interest' (CPS, 2013, para. 4.7-4.12). This gives the CPS discretion to not prosecute. A recent case in Preston where a woman was convicted of murdering her newborn baby after a concealed birth (Milne, 2017a) indicates, however, that successful prosecutions do take place, and, further, that prosecutors will not necessarily shy away from seeking the law's ultimate sanction, notwithstanding the existence of more lenient options, such as infanticide. The Percival and Preston cases are just two recent examples, but what we do not have is an overall picture of how the criminal justice system disposes of suspected neonaticide.

Empirical work by Mackay (1993, 2006) which focuses specifically on the use of the infanticide law gives an indication of how some suspected neonaticides are dealt with, indicating a tendency towards a lenient response. In a 1980s study, he observed that 'cases which may lead to an infanticide or related charge tend to be of the type where prosecutorial discretion is likely to be exercised in the female defendant's favour' (1993, p. 29): no prosecution was taken in 11 of the 21 newborn victim cases in his sample, in most cases because it was considered to not be in the public interest to prosecute. A subsequent study of infanticide convictions involving 15 newborn victims during the period 1990 to 2003 evidences a tendency to charge with murder but to dispose of the case as 'infanticide' (Mackay, 2006). The accused in the newborn sample had all pleaded guilty to infanticide, but in nine of these cases the original charge had been murder, with infanticide being later added to the indictment. None of the 15 was given a custodial sentence. The approach taken by the

CPS in the second study may suggest lenient treatment of women suspected of killing their babies at birth. However, the sample only focuses on those convicted of infanticide and so provides no indication of how others who were suspected of killing their babies at birth but who were not disposed of under the infanticide law were treated. Limited available research into the outcome of all cases of neonaticide prevents a firm conclusion from being drawn. Furthermore, the discretion available to the CPS when deciding whether to prosecute and what kind of charge to bring, means that it is not possible to generalise in these cases. For some women leniency appears to drive prosecutorial decisions but this suggestion cannot be applied across all cases.

### **The neonaticidal woman and the criminal justice system – some reflections**

Our analysis of the legal dynamics of cases of neonaticide leads us to four reflections. The first relates to the language that surrounds newborn child killing and specifically the use of the term ‘neonaticide’ in both academic literature and wider social use. As illustrated above, the term neonaticide is employed within the literature to describe the death of a child/foetus in various circumstances, ranging from the child born alive and then violently killed by its mother, to the foetus that dies before or during labour, whatever the cause of death. Scholarly analyses of neonaticide has included deaths that may not have been acts of homicide, due to for example a lack of evidence of the legal requirements for imposing liability (for example, live birth). As such, the appropriateness of the term ‘neonaticide’ as a catch-all term to cover all cases where the death of the foetus/baby occurs at birth needs to be considered. As a general term to describe a typology of killing it can be useful. However, within a legal context, ‘neonaticide’, as a concept, does not encapsulate the complexities that surround these deaths. We would caution against the application of this term to describe the deaths of infants/foetuses.



Our second reflection relates to the complexities involved in prosecuting cases of suspected neonaticide, the issue of consistency in criminal justice practice, and the need for further research. As highlighted by the case of Ruth Percival, due to the typical circumstances involved in cases of suspected neonaticide, prosecutors may face difficulty in passing the first requirement for prosecution— evidential sufficiency – despite the range of offences at their disposal. There is also an issue of consistency in approach given the variety of options open to prosecutors in terms of the offences they can consider; the fact that they have discretion to not prosecute on public interest grounds; and have the option to accept a guilty plea for another offence (for example an infanticide plea on a murder charge).

Whilst we do not seek to challenge prosecutorial discretion per se, we do wish to highlight the risk for inconsistency between cases with similar factual backgrounds. In the US, for example, Oberman's (1996) research has shown that cases of suspected neonaticide can result in widely disparate criminal outcomes, ranging from first degree murder charges (and prison sentences of over 30 years) to charges for misdemeanors with very lenient sentencing. Whilst the American and English approaches are not directly comparable, for example the latter has a specific infanticide law and a tendency towards more lenient outcomes (Maier-Katkin and Ogle, 1997), Oberman's (1996) research does highlight the risk of inconsistency in approach.

What is needed is further research to consider the application of the law across cases to assess a number of issues, including consideration of the following: the charges brought in cases involving suspected neonaticides; the outcome of prosecutions; the role and impact of guilty pleas; the extent to which the CPS exercises discretion to not prosecute; the extent to which all of the foregoing are affected by the factual background, such as whether differences in decisions and outcomes can be explained by differences in the evidence and the circumstances. In this regard, questions about the role of non-legal factors in the processing

of these cases should also be addressed. For example, do judgments about suspected neonaticide offenders as women and mothers play a role in how they are dealt with by the criminal justice system (Morris and Wilczynski, 1993; Allen, 1987; Brennan, forthcoming-a). Another interesting issue to consider is the role of social norms in the criminal justice response to these cases (Brennan, forthcoming-b). Due to the sensitive nature of this area of law and the discretion of the police and CPS, we suggest that such research would need to be conducted with the support of criminal justice bodies.

Our third reflection directly speaks to the aims of this book – the implications of criminal justice involvement with women, in this instance with regard to cases of suspected neonaticide. Considering the nature of these cases, specifically the vulnerability of the offender, we believe it is important to consider whether the involvement of criminal justice in such cases is the most appropriate response. There is a significant body of evidence supporting the claim that women involved in cases of suspected neonaticide are vulnerable. As outlined in this chapter, they are often young and single. Furthermore, research has demonstrated that women's responses to their pregnancies – concealment/denial of the pregnancy, solo birth and death of the infant – can be attributed to the fear of the reaction of others to her pregnancy (Alder and Baker, 1997; Meyer and Oberman, 2001; Spinelli, 2003). For example, Beyer et al. (2008) conclude from their review of law enforcement files in the US that women are often motivated by fear, associated with the shame and guilt of being pregnant and concern about the reaction of parents, partners and others if the pregnancy is discovered. Oberman (2003) advocates that maternal filicide is deeply embedded in and responsive to the societies in which it occurs, citing contemporary American policies towards single parents.

Considering the context and the nature of cases of neonaticide, the suitability and purpose of criminalising these women needs to be considered. For instance, it can hardly be

said that convicting women of a homicide offence, or any other crime available to prosecutors in this area, will act as a means of preventing similar instances by other women. To suggest that the law will act as a deterrent seems to imply that women may become pregnant for the purpose of killing the foetus/newborn. Certainly, it ignores the context of this crime, in particular the fact that it may follow a denied pregnancy where birth comes as a shock and where the woman may act out of fear and desperation; in other words, that her mental and emotional state is such that she is incapable of being deterred.

It is undoubtedly symbolically important for the law to say that the killing of an infant who has achieved legal personhood will be treated as seriously as other homicides. To suggest otherwise would not only raise moral questions about the sanctity of human life, but also human rights concerns about the right to life of infants, for example under article 2 of the European Convention on Human Rights. It seems morally abhorrent to suggest that those who kill the most vulnerable in our society should not be subject to criminal sanction. A full examination of the ethical, legal and philosophical questions that arise is beyond the scope of this article. At this point the most that can be said is that the vulnerability of women who kill their babies at birth suggests that caution is needed regarding whether and when they should be criminalised. In this regard, prosecutorial discretion to not prosecute under the public interest test may be particularly important in terms of ensuring that vulnerable girls and women are not criminalised, but this carries disadvantages, particularly with regard to consistency in approach. Minimal criminalisation involving an appropriate lenient conviction with a non-custodial sentence, such as can be provided under the infanticide law, may also provide a suitable balance between protecting vulnerable girls/women from further trauma through harsh criminal sanction, whilst at the same time at least symbolically vindicating the life of the baby (Brennan, forthcoming-a).

This leads to our final reflection – if the law is unlikely to assist in the protection of newborn children and to assist vulnerable pregnant women from seeking help prior to going into labour, then what will? A number of scholars have concluded their studies into concealed/denied pregnancy and its connection with neonaticide by advocating that increased surveillance of all women of childbearing age is an appropriate preventative measure, including conducting regular pregnancy tests (Jenkins et al., 2011; Kaplan and Grotowski, 1996). While such measures may capture a proportion of the women who fail to appreciate that they are pregnant until the later stages, such a proposal cannot hope to stop all cases of neonaticide. Furthermore, such testing would be obstructive and invasive for all women, prioritising the welfare of a child that is not yet conceived over the ability of women to control and regulate their own bodies (Brazier, 1999). Instead, the provision of support for vulnerable women would be a more appropriate and likely more successful programme for prevention. This could take the form of community support for women living with the threat of abusive relationships and those living in poverty. For young women, comprehensive, state regulated and mandated sexual health education which promotes the use of contraception, and support if a pregnancy occurs, would also be a reasonable measure for prevention.

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<sup>1</sup> Analysis presented here is based upon the research conducted by Milne (2017b)

<sup>2</sup> Data as at 14 November 2016; figures are subject to revision as cases are dealt with by the police and the courts, or as further information becomes available. Data obtained from Homicide Index, Home Office.

<sup>3</sup> Data obtained from Office for National Statistics (2016).

<sup>4</sup> A duty of care, in other words liability for injury caused by negligence, is imposed in the case of road traffic accidents due to the existence of compulsory third party motor insurance, (Congenital Disabilities (Civil Liability) Act 1976, ss 1(1) and 2; Cave, 2004, p. 55).

<sup>5</sup> Infanticide could be used as an alternative charge or conviction providing both the requirements for gross negligence manslaughter and the additional infanticide requirements had been proven, including the fact that the woman had a disturbance in the balance of the mind caused by the effect of childbirth (Infanticide Act 1938, s1(1) and 1(2)).

<sup>6</sup> Discussion of these defences is outside the scope of this chapter.

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